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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 938

DELLA HADLEY, LUCILE S. STARK, LILLIAN WAGNER, and GWENDOLYN M. WELLS,
Appellants,

VS.

THE JUNIOR COLLEGE DISTRICT OF METROPOLITAN KANSAS CITY, MISSOURI, JAMES W. STEPHENS, President, WILLIAM L. CASSELL, REED B. KENAGY, JR., and MRS. Y. B. WASSON, Members, and LINDA L. COULSON, Secretary, of the Board of Trustees of The Junior College District of Metropolitan Kansas City, Missouri,

AND

HONORABLE NORMAN P. ANDERSON, Attorney General of the State of Missouri,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF OF APPELLANTS

OPINION BELOW

The opinion, judgment and decree of the Supreme Court of Missouri is reported in 432 S.W.2d 328.

A copy of the majority opinion and judgment is found at A. 25-37. The dissenting opinion of Judge Seiler is found at A. 37-51.

JURISDICTION

This is a junior college redistricting case, involving the constitutionality of part of §178.820, R.S.Mo. (Cum. Supp., 1967), V.A.M.S. This proceeding is brought pursuant to 28 U.S.C., Section 2101 (c). The date of the judgment sought to be reviewed and the date of its entry is September 9, 1968. The order denying a rehearing is dated October 14, 1968. The notice of appeal was filed November 14, 1968 in the Supreme Court of Missouri. The statutory provision believed to confer on this court jurisdiction of this appeal is 28 U.S.C., Section 1257(2) since the validity of a state statute is in question on the ground of its being repugnant to the Constitution of the United States, and the decision of the Supreme Court of Missouri was in favor of its validity. The cases sustaining the jurisdiction on direct appeal are *Bantam Books, Inc.* v. *Sullivan,* (R.I. 1963) 83 S.Ct. 631, 372 U.S. 58, 9 L.Ed.2d 584, and *Winters* v. *People of State of N. Y.,* N.Y. 1948, 68 S.Ct. 665, 333 U.S. 507, 92 L.Ed. 840. The appeal was docketed in this Court on January 13, 1969 and probable jurisdiction was noted on March 3, 1969.

THE QUESTION PRESENTED

Whether those portions of §178.820-1, R.S.Mo. (Cum. Supp., 1967), V.A.M.S., which under certain circumstances establish a formula for election of trustees from component school districts within a junior college district (rather than at large within the entire district) are unconstitutional under the equal protection clause of the Fourteenth Amendment to the United States Constitution, as a denial of the "one-man, one-vote" principle.

STATUTE INVOLVED

The validity of §178.820-1, R.S.Mo. (Cum.Supp., 1967), V.A.M.S., is involved and it is set out herein verbatim as follows:

"In the organization election six trustees shall be elected at large [except that if there are in the proposed junior college district one or more school districts with more than thirty-three and one-third per cent and not more than fifty per cent of the total school enumeration of the proposed district, as determined by the last school enumeration, then each such district shall elect two trustees and the remaining trustees shall be elected at large from the remainder of the proposed district. If any school district has more than fifty per cent and not more than sixty-six and two-thirds per cent of the total school enumeration of the proposed district then three trustees shall be elected at large from such school district and three trustees at large from the remainder of the proposed district. If any school district has more than sixty-six and two-thirds per cent of the total school enumeration of the proposed district then four trustees shall be elected at large from such school district and two trustees elected at large from the remainder of the proposed district]. If the trustees are elected at large throughout the entire proposed district, the two receiving the greatest number of votes shall be elected for terms of six years each, the two receiving the next greatest number of votes, for terms of four years each, the two receiving the next greatest number of votes, for terms of two years each. [If the trustees are elected in any manner other than at large throughout the entire proposed district, then the trustees elected shall determine by lot the two who shall serve for six years, the two who shall serve for four years and the two who shall serve for two years.] The period of time between the date of the organization election and the date of the first regular election of the junior college district is consid-

ered a full two years in the terms of the directors. Thereafter, all trustees elected shall serve for terms of six years each." (Brackets added).

Only the bracketed portions of the statute, providing for election of trustees from component school districts under certain enumeration ratios, are attacked as unconstitutional. The statutory provisions for at large elections are not in question. The statute's official publication is Page 325, §13-84 of the Missouri Laws, 1963. It may also be found in Volume 11A, Vernon's Annotated Missouri Statutes, Page 353, as §178.820.

STATEMENT OF THE CASE

Appellants are four citizens and taxpayers of the Kansas City School District and of the appellee junior college district, one of them being a trustee of the district. Defendants are the junior college district, its other trustees and secretary, and the attorney general of Missouri. Appellants seek to apply the "one man-one vote" principle to the election of all trustees of the district.

The federal questions sought to be reviewed were first raised in the Circuit Court of Jackson County, Missouri, by the appellants' first amended petition (A. 3-14) in which they allege that the statutory formula for the election of trustees from subdistricts is unconstitutional and violates their rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution. The question was passed on by the court by its sustaining defendants' (appellees') motion to dismiss and entertaining a final judgment of dismissal with prejudice (A. 15). The questions presented were then raised in the Supreme Court of Missouri by the agreed Stipulation and Statement of the Case filed under Missouri Supreme Court Rule 82.13 (A. 16-23), and by inclusion in appellants' Points and Author-

ities presented to the Missouri Supreme Court. That court specifically considered the constitutional question and held that the statute was valid under the Fourteenth Amendment to the United States Constitution (A. 24) (R. 56).

The Junior College District of Metropolitan Kansas City, Missouri is a junior college district organized and existing under the laws of the State of Missouri and specifically under the provisions of R.S.Mo. 178.770 through 178.890 (A. 17).

The geographical boundaries of the district include parts of Jackson, Clay, Cass and Platte counties for a total of 400 square miles. Since its organization, the Junior College District has maintained a junior college offering courses to all students enrolled therein. The district comprises Kansas City School District No. 33, Center School District No. 58, Consolidated School District No. 1 (Hickman Mills), Consolidated School District No. 2 (Raytown), Consolidated School District No. 4 (Grandview), Reorganized School District No. 7 (Lee's Summit), North Kansas City School District No. 74, and Belton School District No. 124 (A. 17-18).

The phrase "school enumeration" as used in R.S.Mo. 178.820 means an enumeration of all persons between the ages of 6 and 20 years, resident within each component school district (R.S.Mo. 167.011). Section 178.820 of the Revised Statutes of Missouri provides that if there are in a junior college district one or more school districts with more than 33-1/3% and not more than 50% of the total school enumeration of the junior college district as determined by the last school enumeration, then the voters of each such district shall elect two trustees and the remaining trustees shall be elected at large from the remainder of the district. If any school district has more than 50% and not more than 66-2/3% of the total school enumeration

of the junior college district then three trustees shall be elected at large from such school district and three trustees at large from the remainder of the junior college district. If any school district has more than 66-2/3% of the total school enumeration of the district then four trustees shall be elected at large from such school district and two trustees elected at large from the remainder of the junior college district (A. 18).

The table on the second page of Judge Seiler's dissenting opinion (A. 38) sets out the enumeration figures for the district for the years 1963-64 through 1966-67 and shows that although Kansas City School District No. 33 has had from 59.49% to 63.55% of the total school enumeration of the district, it has received only 50% of the board representation. The following table in the dissenting opinion (A. 38) sets out the figures for all nine of the Missouri junior college districts and, except for the three in which trustees are elected at large, reflects the large disparity between the percent of enumeration of the large component districts and their actual percentage of representation on the boards of trustees.

Appellants contend that the statutory formula, facial and in fact, discriminates against the voters in the larger component school districts and results in malapportionment of all six of the state junior college districts in which the trustees are elected under the statutory formula.

A junior college district has the power to sue and be sued, to levy and collect taxes within the limitations of §§178.770-178.890, V.A.M.S., to issue bonds and exercise the same corporate powers as common and six-director school districts, other than urban districts, except as otherwise provided by law, §178.770; to provide instruction, classes, school or schools, determine per capita cost of col-

lege courses, collect approved nonresident tuition fees and charges to resident pupils, §178.850; to conduct hearings and suspend or expel pupils on disciplinary charges, §167.161; to make rules and regulations for the organization, grading and government of the district, §171.011; to let contracts, employ and dismiss teachers and approve bills, §178.830; to appoint employees and define and assign their powers and duties and fix their compensation, §178.860; to pass on annexation of school districts to the junior college district, §162.441, and to acquire real property by condemnation, §177.041 (A. 40).

ARGUMENT

I

Equal Population Principle Applies to School Districts. A. Prior Applications of Doctrine.

This Court has applied the "one man, one vote" principle to Congressional Districts in *Wesberry* v. *Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), to state legislatures in *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and companion cases, and to county governing bodies in *Avery* v. *Midland County, Texas*, 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114 (1968).

Other distinguished courts have applied the doctrine to city councils, including the Supreme Court of Missouri, in *Armentrout* v. *Schooler*, (Mo.Sup.) (1966), 409 S.W.2d 138, and *Ellis* v. *Mayor and City Council of Baltimore*, 352 F.2d 123 (1965) (C.A. 4).

Other courts have applied the doctrine to school districts, *Meyer et al.* v. *Board of Education of Carroll County*, (Iowa Sup. Ct.) (1967) 152 N.W.2d 617; *Strickland* v. *Burns*, 256 F.Supp. 824 (1966) (D.C. Tenn.); *Delozier et al.* v. *Tyrone Area School Board*, 247 F.Supp. 30 (D.C. Penn.) (1965), and *Pitts* v. *Kunsman*, 251 F.Supp. 962, 964-5.

B. Government of Schools Is a Matter of Major National Concern.

As Chief Justice Warren stated in *Brown* v. *Topeka Board of Education*, 74 S.Ct. 686, 691, 347 U.S 483, "Today education is perhaps the most important function of state and local governments". The statement made in 1954 in the context of racial integration of schools has even greater validity today. Among our major governmental domestic concerns is the conducting of the business of educating our young. A time honored and uniquely American concept holds that the public school system and the education of all our citizens are the responsibility of the entire community. Accordingly the tax burden of school support is that of the general citizenry, which also is commonly the electorate for decisions affecting schools. It would therefore seem that the principle of electoral democracy and equality should have one of its most important applications in local school matters. The importance of education in a democratic society was well stated by U. S. District Judge Weinstein in his dissenting opinion in *Kramer* v. *Union Free School District*, 282 F.Supp. 70, 76:

> "An educational system constitutes a modern society's crucial genes. By shaping the minds and attitudes of the young, it determines their individual and collective future. Only through excellent schools and teachers can a democracy such as ours achieve the equality of opportunity and the informed electorate vital to its existence. In this country, the concern with education manifests itself in large sums of public and private money expended, in strong feelings of our citizens about current educational issues, and in studied attempts to preserve local control.
>
> Last year the total expenditure on education in United States public and private schools was over fifty billion dollars, about seven percent of our gross national product. Approximately thirty billion dollars was spent

for primary and secondary education in public schools. When the time of enrolled students, who number almost sixty million, is considered, education is clearly the predominant constructive activity of this nation.

Headlines daily furnish examples of the deep passions stirred by debate on control of educational policy. One of the substantial pressures on peaceful race relations has come from the problems created by integration of schools. In the North as well as the South, people have at times abandoned the ballot and the courts and taken to the streets in an attempt to settle these problems. The right to vote in school board elections is the right to participate in attempts at controlling deep currents in our society which can nurture or destroy."

As Judge Weinstein points out, the denial of the franchise in school board elections affects decisions as to the expenditure of the major portion of local government funds and much of state and federal funds, denies a voice in administration of broad educational programs affecting all citizens and precludes participation in decisions determining in a large measure the character and quality of the community.

C. Broad Governmental Powers of School Trustees.

The recent rash of student disorders has brought legal consideration of the scope and range of the legislative, judicial and executive powers of state colleges and universities. College trustees legislate to a large degree in adopting regulations governing standards of student conduct and establishing procedural rules for conducting hearings where students are charged with violations of school regulations. Certainly as to its students a school has all powers of a general governmental character.

The Missouri legislature is vested with the duty under Section 1, Article IX of the Missouri Constitution to provide for public education. Pursuant thereto it has by stat-

ute authorized the formation of junior college districts, as "bodies corporate and subdivisions of the state" (V.A.M.S., §178.770), with power to levy and collect taxes, issue bonds, hold elections, and with broad powers to govern the affairs of the district, for the purpose of carrying out state governmental functions. In the exercise of that duty the legislature has elected to delegate the power to perform those responsibilities to boards of trustees to be elected by the people in the junior college district.

Under the laws of Missouri (V.A.M.S., Chapter 178) the trustees of a junior college district exercise legislative and administrative functions, including levying of taxes, preparation of an annual budget, establishing of rules and regulations for the government of the district and otherwise functioning as the legislative and policy making body of the district.

The board of trustees has broad legislative powers as to the affairs of the district. It makes major policy decisions, hires and fires large numbers of personnel, has the authority to acquire land by condemnation or purchase, to levy and collect taxes, to issue bonds, to hold elections, to adopt regulations and rules for the operation of the district, to discipline students, to establish standards and fees for admission, to engage in extensive expenditure of public funds. It is independent of municipal control of any city in which it is physically located, is not subject to city zoning laws and has the authority to maintain its own police and fire protection, as well as other functions comparable to a municipal government.

D. "Legislative-Administrative" Distinction Is Invalid.

In *Meyer* v. *Board of Education*, supra, the Supreme Court of Iowa on August 31, 1967 held that where the members of the County Board of Education were elected from

districts, the 14th Amendment of the U.S. Constitution and the "Bill of Rights" of the Iowa Constitution required that the districts be of substantially equal population. The statutory method of selection provided for division of the county into four election districts as nearly as possible of equal territorial size, with one member to be elected by the electors of each district and one member to be elected at large. The evidence was that the districts varied substantially in population. The decision was rendered after the U.S. Supreme Court ruling in *Sailors* v. *Board of Education*, infra, and points out that the U.S. Supreme Court did not pass on the question involved where the legislature has provided for election (rather than appointment) of the county board. The court said:

> "From this observation it is reasonable to believe that where the legislature chooses to submit the selection of an official or board to the electorate, it is of no conquence whether its functions affecting the personal and property rights of the people are administrative or legislative. In either case, those affected should be and are entitled to equal protection of the law. In such cases it seems the 'well developed and familiar' (Baker v. Carr, supra, 369 U.S. 186, 226, 82 S. Ct. 691, 7 L. Ed. 2d 663) judicial standards of the equality clause are applicable to determine whether a state has discriminatorily denied or diluted a citizen's right to exercise the elective franchise."
>
> * * *
>
> "Where the election of those members is required, and where as here the legislature provides for the election of these representatives of the people whether their function be considered legislative, quasi-legislative, or primarily administrative, their election must be made on a population basis, not upon area."

To hold that the equal protection principle of "one person, one vote" applies to a county board of supervisors,

while attempting to distinguish a school district as a governmental agency of special or limited power and jurisdiction, or to argue that since some of the functions of school boards are administrative and quasi-judicial and not exclusively legislative in character and that therefore equal protection should not apply, is to engage in technical distinctions having little meaningful significance. As District Judge Miller stated in his concurring opinion in *Strickland* v. *Burns*, 256 F.Supp. 836, a 2-1 decision applying one man-one vote principles to the Rutherford County School Commission of Tennessee:

> "It is fruitless, in my view, to pursue the elusive distinction between legislative and administrative functions. Many attempts have been made to draw the distinction in varied contexts. But whatever value the dichotomy may have for some purposes to rationalize a particular result, I am convinced that it is inapposite here. So long as a subordinate body is vested with significant and important powers of government, whether they be labeled legislative, or administrative, or both, I can see no reason why it should be permissible under the equal protection clause for a state arbitrarily to debase the value of one person's vote in favor of another. I think that the powers and duties vested by state law in the Rutherford County School Commission are both significant and important. If the General Assembly of Tennessee sees fit to provide that the membership of such a body shall be chosen by popular vote, invidious discriminations between voters should be condemned under the 'one man, one vote' rule."

E. The Special District Analogy Is Not Applicable.

It has been argued that school districts fall within the category of "special" districts and that such special districts are not subject to the strictures of the Fourteenth Amendment in the selection of their governing bodies.

A school district is not what is commonly considered as a special district, sometimes called "special purpose", "special benefit" or "special assessment" districts. The special district commonly has three characteristics.

(1) It is considered as benefiting only a limited or special group.

(2) The taxing power of the district is directed only toward that special group.

(3) The specially affected group composes the limited electorate for the purpose of electing the governing body.

As illustrations, two Missouri statutes establish such districts. §249.770, R.S.Mo., establishes sewer districts in Class Two Counties. In the election of supervisors only owners of property in the district are entitled to vote. §245.060, R.S.Mo., provides for the election of supervisors of a levee district and gives only landowners in the district the right to vote, each owner having one vote for each acre of land owned in the district. In each of these special benefit districts clearly the direct benefit of the improvement (sewer or levee) accrues only to the landowners, who are also the only persons specially assessed for the improvement.

Clearly no such situation here exists. This Court is not being asked to consider whether a limited electorate is proper. All voters resident in the junior college district may vote, and all persons within the district are subject to taxation for the financing of the district.

Appellees cannot argue that the voters of suburban or small school districts are more affected by the performance of the functions of a junior college than are dwellers of the inner city, or of large school districts. The Court is therefore not confronted with the question as to whether a

special unit of government whose functions affect definable groups of constituents more than other constituents may be apportioned so as to give greater influence to the citizens most affected by the organization's function.

Concern has been expressed about the problems of reapportioning the thousands of fire, sewer, water and drainage districts in this country. As a practical matter almost all such districts elect their trustees or commissioners at large. As a legal matter, we see no reason why the democratic doctrine of equal representation should not apply to all levels of government in which governmental officials are popularly elected by voters from election districts. The right is that of a voter to have his vote for a particular public office counted equally with all other voters voting for the same office. The language of the Fourteenth Amendment guaranteeing equal protection of the laws does not spell out any exceptions to the fundamental concept in a democracy that each voter shall have one vote, weighted equally with all other votes, and the majority decision will govern. It is unsound to say that a popularly elected board does not represent the interests of the electorate. The character of the problems facing a school board may vary from those facing a state legislature, but the representative character of its selection, and its responsibility to the electorate is the same.

The majority opinion of the Supreme Court of Missouri cites (A. 35) the article by then Professor Jack B. Weinstein in 65 Columbia Law Review 21, for the position that the author would not apply the "one-man, one-vote" doctrine to special purpose units of local government. The Court then assumes that Professor Weinstein would include school districts within that category. In *Kramer* v. *Union Free School District*, 282 F.Supp. 70, Professor Weinstein (now District Judge Weinstein) in his dissenting opinion

beginning at p. 75 and with particular reference at pp. 76 through 78, makes it quite clear that he views school districts in the category of governmental bodies which *are* subject to the mandate of the Fourteenth Amendment. The issue in *Kramer* was not the same as in the instant case since there the issue involved the right of the legislature to fix voter qualifications. In the instant case the statute recognizes the right of all voters to participate but weights their votes by a discriminatory statutory formula. Nevertheless, Judge Weinstein's thorough opinion makes it clear that on the "gateway" issue as to the applicability of the Fourteenth Amendment he views the mandate as encompassing school districts.

F. The Decision in Avery Governs, Rather Than That in Sailors.

This court, in *Avery* v. *Midland County, Texas*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), although dealing with the election of county commissioners, suggests that voting for school boards falls within the ambit of its decision when it said "If voters residing in oversize districts are denied their constitutional right to participate in the election of state senators, precisely the same type of deprivation occurs when the members of a city council, school board or county governing board are elected from districts of substantially unequal population".

Confusion however exists because of the dicta of this court in *Sailors* v. *Board of Education*, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650. The majority opinion of the Supreme Court of Missouri in the instant case relied on *Sailors* for the proposition that the "one man, one vote" doctrine does not apply to governmental agencies which perform "essentially administrative functions" which are not legislative "in the classical sense". On the other hand the dissenting opinion of Judge Seiler points out that the

issue was not presented by the facts of that case, Justice Douglas pointing out that the Michigan system of selecting members of the county school board is basically appointive rather than elective.

The Supreme Court of Iowa in *Meyer* v. *Board of Education*, 152 N.W.2d 617, rendered after this court's ruling in *Sailors*, viewed this court's action in *Sailors* as not passing on the Iowa question, where the legislature (as in the instant case) provided for the *election* of the county board of education.

It appears to appellants that *Sailors* merely suggests that the extent of the legislative powers of a governmental agency may be a factor in determining whether an election is required, but that if the statute (as here) specifically provides for an election in which all members of the electorate may vote, then the votes of all voters shall be equally weighted as closely as practicable. In view of this court's holding in *Avery*, it seems that the "legislative-administrative" distinction relied upon by the Supreme Court of Missouri is not tenable.

G. No Analogy to Sailors Facts.

The statute enabling junior college districts provides for them to be established by combining a group of school districts, which we refer to as the "component school districts". However, other than their significance as a logical or convenience grouping of adjacent school districts, the component school districts, as such, play no role in the operation of the junior college district.

The statutory provision for election of trustees adopts the existing component school districts as convenient units for structuring election districts for the election of trustees. The school districts themselves however have no function within the junior college district. The school district lines

merely become the basis for election district lines, the large school district (over 1/3, 1/2 or 2/3 of total enumeration) becoming one election district and the smaller districts being combined to form a second election district from which junior college trustees must then be elected.

It is not the school districts, but all the voters within the districts who are the electorate for selection of junior college trustees. The trustees or directors of the component school districts have no role or responsibility whatsoever in the affairs of the junior college district. Thus, the factual situation is totally different and distinguishable from the situation in *Sailors*. There the school board members of each local school district designated one board member to attend a meeting at which county school board members were selected. Here there is no such situation, in that neither the local school districts nor their trustees have any role whatsoever in the junior college trustee elections.

II

Missouri Junior College Statutes Violate "One Man, One Vote" Principle.

A. Statutes Produce Facial and Actual Malapportionment.

(1) Statutory formula compels discrimination between voters.

The stipulated facts present a classical reapportionment issue in a relatively clear cut and simple situation.

The pertinent statutes establishing the procedure for election of junior college board members (V.A.M.S., §§ 178.820 and 178.840) are almost a text book example of malapportionment by statutory formula. The formula, limiting the representation of the large school districts, automatically compels under-representation of the voters in the large districts and over-representation of the voters in the small districts. The only question in each case is

as to the extent of the under-representation produced by the formula. The table will illustrate:

Enum. of Dist.	No. Trustees	% Rep.	Max. % Enum.	Max. Malapp.
1/3 but under 1/2	2	33.3%	49+%	2 to 1
1/2 but under 2/3	3	50.0%	66+%	2 to 1
2/3 or over	4	66.7%	99+%	1 to Infinity

Under the formula the discriminatory ratio may be as much as 2 to 1 and if a large component district has over two-thirds of the total enumeration the variance has no theoretical limit. For example, a large school district might have 90% of the total district enumeration. Its voters would elect 4 trustees. The remaining voters, from school districts having 10% of the total enumeration would elect 2 directors. Thus, the malapportionment in favor of the voters of the small school districts would be 4-1/2 to 1.

(2) Statute has produced actual malapportionment, as applied.

As shown by the table of representation in all Missouri junior college districts (R. 14 and R. 23) the actual malapportionment, in five of the six districts to which the formula applies, ranges close to the maximum theoretically possible under the discriminatory formula. The result is real not just theoretical under-representation.

Converting the statistics of the table into conventional ratios commonly used for comparison in reapportionment matters we arrive at the following figures:

District	Variance from Norm.	Ratio of Representation
St. Louis-St. Louis Co.	37.1%	1 to 1.68
Jasper Co.	46.4%	1 to 1.92
Three Rivers	11.4%	1 to 1.18
Sedalia	28.9%	1 to 1.81
Mo. Western	20.2%	1 to 2.02
Kansas City	27.1%	1 to 1.75

The variance from the normal is that of the representation in the large component school district in each case and is obtained by dividing its percentage of actual representation (i.e. percentage of directors) into its percentage of total enumeration. Ratio of representation is the ratio of representation in the large component district as against that in the small component districts and is computed by dividing the enumeration per director in the large component district by the enumeration per director in the small component districts. Thus in Missouri-Western Junior College District the St. Joseph School District has 80% of the enumeration and its voters elect four trustees, as against the two trustees elected from the remainder of the district with 20% of total enumeration, an actual malapportionment of 2 to 1.

(3) The statutory formula always favors the voters in the small component districts.

As shown by the table (R. 14 and R. 23) the actual discrimination in each case is against the voter of the large component school district. It can be no other way, under the formula. Significantly the variance may move only in one direction—to the detriment of the larger school districts (usually the urban area) and to the great advantage of the smaller districts (usually suburban). Variances, though small, are automatically suspect and subject to constitutional attack as invidious, where the variance is demonstrated to favor one segment of the population. In *Lucas* v. *Colo. Gen. Assembly*, supra, 12 L.Ed.2d 632, 646, Chief Justice Warren said "disparities from population based representation, though minor, may be cumulative instead of off-setting, where the same areas are disadvantaged in both houses of a state legislature, and may therefore render the apportionment scheme at least constitutionally suspect". See also *Ellis* v. *Mayor & City Council of Baltimore*, 352 F.2d 123, 129.

B. "Enumeration" As Basis for Allocating Trustees Does Not Evade One Man One Vote Doctrine.

In determining whether the trustees shall be elected at large or from two districts, the statutory formula does not use population, but "school enumeration", which by statutory definition is an enumeration of all persons between the ages of 6 and 20 years resident in the component school districts.

It cannot be argued that the use of "school enumeration", rather than population figures, exempts the election from the "one man, one vote" mandate. The situation is somewhat analogous to that presented where the use of registered voters lists is proposed as a substitute for population figures. One must make one of two assumptions. If school enumeration bears a reasonable and consistent ratio to population figures, throughout the district, then a proper allocation of trustees by school enumeration would conform to the same allocation by population. In effect "school enumeration" is nothing more than an index of population. The requirement of equalizing districts by population is then achieved by the equalization of enumerations, "as nearly equal as practicable".

In *Burns* v. *Richardson*, 384 U.S. 73, 16 L.Ed.2d 376, 86 S.Ct. 1286, this Court considered registered voters figures as a basis for apportionment and held:

> "In view of these considerations we hold that the present apportionment satisfies the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators, not substantially different from that which would have resulted from the use of a permissible population basis."
>
> (and at l.c. 392) "Registered voters was chosen as a reasonable approximation of both citizen and total population."

As stated in *Bannister* v. *Davis*, 263 F.Supp. 202, 207 (1966 D.C. La.):

> "The Fourteenth Amendment allows apportionment plans to use bases other than population but only when population figures are unavailable and the figures employed 'substantially [approximate] * * * that which would have appeared had * * * population been the guide'."

On the other hand, if appellees argue (as they have not) that school enumerations do not parallel population ratios, then the statute fails to meet the mandate of the Fourteenth Amendment because a standard other than population has been employed, without rational justification.

Appellees offered no evidence to indicate what relationship school enumeration has to total population, or whether that ratio varies from school district to school district. Consequently they cannot very well present any rational basis for a deviation which they have not proved to exist.

In either event the statute further fails because of the malapportionment compelled by the statutory formula which favors the voters in the small component districts and discriminates against the voters in any component district having over one-third of the total enumeration of the junior college district. This is true whether enumeration is accepted or not as population-related.

It should be emphasized that the definition of "enumeration" has nothing to do with the qualifications of the electorate. The voters in junior college trustee elections are all those persons qualified to vote, i.e., the entire general electorate of the total junior college district.

C. No Rational Basis for Distinguishing Between Voters of Large and Small Component School Districts.

The statute arbitrarily favors the voters of the small component school districts (those having less than 1/3 the total enumeration of the district). There is no rationale presented or apparent for such blatant favoritism. The component school districts, as such, play no role in the operation or policy of the junior college district. They are merely convenient "electoral" districts. Neither the small school districts nor their voters have any peculiar problems (vis-a-vis junior college education) which justify favoring them over the large districts. The legislature, in its discretion chose to use the component district boundaries as election district lines. This, it may do. However the evil arises not in selecting existing school districts as election districts, but in giving the voters of the small districts over-representation by a statutory formula. Attempts to favor non-urban areas against urban areas by statutory formula have been consistently held not to be constitutionally acceptable as a rational basis for classification. *Reynolds* v. *Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Ellis* v. *Mayor & City Council of Baltimore*, 352 F.2d 123, 128; *Davis* v. *Dusch*, 361 F.2d 495, 498.

III

CONCLUSION

Fortunately the relevant statutes (R.S.Mo. 178.820 and 178.840) provide an alternative procedure for election of trustees at large, which comports with constitutional requirements. Consequently the court is not faced with the dilemma of having to require legislative change. It may simply declare the specific portion of § 178.820, which es-

tablishes the component district formula, to be unconstitutional, leaving the balance of the election provisions intact, thereby requiring future elections of trustees at large, unless the Missouri legislature chooses to make statutory changes.

Respectfuly submitted,

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